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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000292-ME

GREGORY TUTTLE — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 11-D-00002

JAMIE LYNN SHROUT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER AND LAMBERT, JUDGES.

KELLER, JUDGE: Gregory Tuttle (Tuttle) appeals from a domestic violence order (DVO) entered by the Clark Family Court. For the following reasons, we affirm.

FACTS

On January 3, 2011, Jamie Lynn Shrout (Shrout) filed a domestic violence petition in the Clark Family Court seeking an emergency protective order (EPO) against Tuttle. The family court denied the request for an EPO on the grounds that the petition failed to state that there was an immediate and present danger of domestic violence. *See* Kentucky Revised Statutes (KRS) 403.740(1). However, pursuant to KRS 403.745, the court caused a summons to be issued to Tuttle and set the matter for a hearing.

On January 13, 2011, the family court conducted a hearing. After hearing testimony from Shrout and Tuttle, the family court entered a one-year DVO against Tuttle. This appeal followed.

STANDARD OF REVIEW

As stated in *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010):

> [KRS] 403.750 permits a court to enter a DVO following a hearing "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]" Under the preponderance standard, the court must conclude from the evidence that the victim "was more likely than not to have been a victim of domestic violence." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous. Kentucky Rules of Civil Procedure ("CR") 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). But with regard to the trial court's application of law to those facts, this Court will

> engage in a *de novo* review. *Keeney v. Keeney*, 223 S.W.3d 843, 848-49 (Ky. App. 2007).

ANALYSIS

We initially note that Shrout has not submitted a brief to this Court. When an appellee does not file a brief, CR 76.12(8)(c) provides three alternative avenues of action for an appellate court:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We have reviewed the record and will address the issues raised.

On appeal, Tuttle first argues that because the family court did not enter an EPO, *res judicata* prevented it from entering a DVO. Specifically, Tuttle argues that, in order for the family court to enter a DVO, Shrout had to allege new or additional facts besides those set forth in her petition. We disagree.

The Supreme Court of Kentucky explained the doctrine of *res judicata* as follows:

> The rule of *res judicata* is an affirmative defense which operates to bar repetitious suits involving the same cause of action. The doctrine of *res judicata* is formed by two subparts: 1) claim preclusion and 2) issue preclusion. Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a

> new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be identical.

Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 459, 464-65 (Ky. 1998) (footnote and internal citations omitted).

We conclude that the doctrine of *res judicata* did not bar the family court from entering the DVO even though it had not issued an EPO. A court may issue an EPO if it "determines that the allegations contained therein indicate the presence of an *immediate and present* danger of domestic violence and abuse[.]" KRS 403.740 (emphasis added). The purpose of an EPO is to protect an individual in imminent danger of suffering domestic violence until a hearing on the domestic violence petition can be held.

Regardless of whether a court enters an EPO, it must still hold a hearing on the domestic violence petition. *See* KRS 403.745. Following that hearing, a court may enter a DVO "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]" KRS 403.750. Unlike the standard used to issue an EPO, the standard used to enter a DVO does not require "the presence of an immediate and present danger." Thus, even if the same facts as set forth in the domestic violence petition are alleged at the domestic violence hearing, the court can find by a "preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may

again occur." KRS 403.750. Accordingly, *res judicata* does not bar the family court from entering a DVO when an EPO was not previously entered.

Having concluded that the family court could enter a DVO, we address Tuttle's argument that there was not sufficient evidence to support its findings. After hearing the testimony from Shrout and Tuttle, the family court chose to believe Shrout's version of events, concluding that an act of domestic violence had occurred. *See Buddenberg*, 304 S.W.3d at 720 (determining that it is within the discretion of the family court to make the final determination regarding the credibility of a witness). Specifically, the family court chose to believe Shrout's testimony that Tuttle choked and scratched her. Additionally, the family court heard testimony from Shrout that Tuttle had threatened her in the past and she was fearful of him. We are of the opinion that Shrout established by a preponderance of the evidence "that an act or acts of domestic violence and abuse have occurred and may again occur." KRS 403.750. Thus, the family court's issuance of the DVO was not clearly erroneous.

CONCLUSION

For the foregoing reasons, we affirm the Clark Family Court's issuance of a DVO against Tuttle.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Elkins
Winchester, Kentucky

NO BRIEF FILED FOR APPELLEE